90-705

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

———

CLIPPER CITY LODGE NO. 516,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

———

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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MATTHEW R. ROBBINS
Counsel of Record
PREVIANT, GOLDBERG, UELMEN,
GRATZ, MILLER &
BRUEGGMAN, S.C.
788 North Jefferson Street
Milwaukee, WI 53202
(414) 271-4500
Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

I. Where an individual is a "supervisor" within the meaning of the Labor Management Relations Act and therefore not an "employee" protected by the Act; does a Union unlawfully coerce an "employee" or cause an employer to discriminate against an "employee", within the meaning of the Act, by providing in a labor agreement that a supervisor could not retain bargaining unit seniority rights unless he continued to pay union dues?

II. Where an individual knows that his bargaining unit seniority rights were terminated in 1972, does the six month limitation period in Section 10(b) of the Labor Management Relations Act bar his unfair labor practice charge, filed in 1986, which protested his loss of seniority rights?

PARTIES TO THE PROCEEDINGS

In addition to the parties identified in the caption, the Manitowoc Engineering Company appeared in the proceedings before the Seventh Circuit Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

Clipper City Lodge No. 516, International Association of Machinists and Aerospace Workers, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., 1a-19a) is reported at 909 F.2d 963. The decision and order of the National Labor Relations Board (App., 20a-41a) are reported at 291 N.L.R.B. No. 122.

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(b)(1) and (2) of the Labor Management Relations Act, 29 U.S.C. Section 158(b)(1) and (2), provide in pertinent part:

> "It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 of the Title . . .
>
> (2) to cause or attempt to cause an employer to discriminate against an empleyee in violation of subsection (a)(3) of this Section . . .

Section 2(3) of the LMRA, 29 U.S.C. Section 152(3) provides in pertinent part:

> The term "employee" shall include an employee, and shall not be limited to the employees of a particular employer . . . but shall not include any individual employed as an agricultaural laborer or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual *employed as a supervisor* . . ." (emphasis added)

Section 10(b) of the LMRA, 29 U.S.C. Section 160(b) provides in pertinent part:

> . . . That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge

by reason of service in the armed forces, in which event the six month period shall be computed from the day of his discharge.

STATEMENT OF THE CASE

The Petitioner Union has represented certain of the Employer's employees since about 1942. Since at least 1970, the labor agreements between the Union and the Employer, provide employees who choose to become statutory supervisors with a limited right to retain bargaining unit seniority rights: the retention of seniority rights is conditioned upon the supervisor either maintaining membership in the Union or obtaining a withdrawal card in accordance with the Union's constitution.

Eugene Ruppelt left the bargaining unit in September, 1972 and began working as a foreman, a "supervisor" within the meaning of the Labor Management Relations Act. Ruppelt continued to hold various supervisory positions with the Employer until January, 1986.

Because of the qualified right to retain bargaining unit seniority rights, Ruppelt requested a withdrawal card from the Union. The Union membership, pursuant to the provisions of its constitution, denied the request for a withdrawal card. Ruppelt appealed the denial to the director of the union district which contains the local union; the director responded that he had no authority under the constitution to interfere with the decision of the local union.

Ruppelt notified his superiors in management that he had not been granted a withdrawal card. He was told that the company would take care of him. Thereafter, although he had been denied a withdrawal card, Ruppelt declined to pay union dues and thereby retain seniority in the bargaining unit.

In January, 1986 the Employer removed Ruppelt from his supervisory position and proposed to transfer him

back to the bargaining unit. The Union objected to this because employees who had bargaining unit seniority were on lay-off. The Employer initially agreed with the union and placed Ruppelt on lay-off status.

Subsequently, the Employer reversed its position and returned Ruppelt to a bargaining unit job on April 11, 1986. Because bargaining unit employees were still on lay-off, the Union filed a grievance. The grievance was submitted to final and binding arbitration pursuant to the labor agreement, and the arbitrator issued a decision and award in June, 1986. The arbitrator held that Ruppelt lost his bargaining unit seniority in 1972 when he failed to maintain membership in the Union by paying dues. On June 24, 1986, Ruppelt filed an unfair labor practice charge against the Union alleging violations of Section 8(b)(1) and (2) of the LMRA, 29 U.S.C. § 158 (b)(1) and (2). The Union thereafter filed an unfair labor practice charge against the Employer. The General Counsel of the Board, Ruppelt, the Union and the Employer filed a stipulation of facts with the Board, stating that the stipulation would constitute the exclusive facts and entire record. The Board approved the stipulation and transferred the proceedings to it for issuance of a decision and order.

The Board held that the Employer and the Union violated the Act by providing in the labor agreement that persons who become supervisors must pay union dues to retain bargaining unit seniority rights. In reaching this conclusion, the Board overruled its prior decision in *Brown and Williamson Tobacco Co.*, 227 N.L.R.B. 2005 (1977). The Board had, in *Brown and Williamson*, considered a similar contractual provision and concluded that it did not constitute unlawful discrimination within the meaning of the Act. The Board had held that the payment of dues merely protects the supervisor's seniority standing at a time when he is not protected by the Labor Management Relations Act.

In this case, the Board overruled *Brown and Williamson* and held that the requirement that a supervisor pay dues in order to retain seniority rights was unlawful discrimination under the Act. The Board further held that although Ruppelt was denied a withdrawal card in 1972 and ceased to have seniority rights under the language of the labor agreement, no adverse action occurred until 1986 when he was laid off. Therefore, the six month limitations period contained in Section 10(b) of the Act did not commerce to run until 1986.

The Board petitioned the court of appeals pursuant to Section 10(e) of the Act, 29 U.S.C. § 160(e), for enforcement of its order. Although recognizing that the collectively bargained language encourages employees to remain members when they are not statutory employees, but supervisors (App., 11a n.5), the court of appeals upheld the Board's conclusion that the language in the labor agreement was unlawful on its face. The court of appeals also upheld the Board's determination that no adverse employment decision occurred in 1972 when Ruppelt was stripped of seniority, only in 1986 when he was laid off under the seniority provisions of the labor agreement.

REASONS FOR GRANTING THE WRIT

This case presents two issues, each of which independently merits the attention of the Court. The first issue is whether an employer and a union may in good faith negotiate an agreement that allows statutory supervisors to retain bargaining unit seniority by paying union dues. The second issue is when the six month limitations period for unfair labor practice charges begins: when the individual loses his seniority rights or when the loss of his seniority rights affects his ability to work in bargaining unit positions.

The first issue involves the fundamental structure of the Act, and it is one with which the Board has struggled, with varying results, over thirty years. The Board

has reversed its position on this issue no less than three times. Because seniority provisions are among the most common clauses in collective bargaining agreements and affect millions of workers, the Court should resolve this fundamental issue of statutory construction. Moreover, the court of appeals' implicit assumption that statutory supervisors could have "accrued seniority" outside the negotiated labor agreement is at odds with other courts of appeals.

The exclusion of supervisors from the protection of the Labor Management Relations Act is a fundamental part of the Act's structure. Section 2(3) of the Act specifically excludes supervisors from the definition of employees covered by the Act and entitled to its protection. Because supervisors are not protected by the Act, an employer may discharge them for joining a union. *Beasley v. Food Fair of North Carolina*, 416 U.S. 653, 656 (1974). The discharge of supervisors for their participation in union or other concerted activity is not unlawful for the simple reason that employees, but not supervisors, have rights protected by the Act. *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402, 404 (1982). Likewise, an employer and a union can agree to require supervisors to join a union. *Jensen v. Farrell Lines, Inc.*, 625 F.2d 379, 387 (1980).

The Board applied this basic precept of the Act when it first upheld a contract provision requiring supervisors to pay union dues in order to maintain seniority rights. Unfortunately, the Board has reversed its position three times since then.

Initially, in *Namm's, Inc.*, 102 NLRB 466 (1953), the Board upheld a contract provision requiring persons who transfer back into the bargaining unit to have seniority credit only if they paid a specified fee to the bargaining representative. Six years later in *Kaiser Steel*, 125 NLRB 1039 (1959), the Board majority, with two members dissenting, held unlawful a contract clause which required

a supervisor to pay an amount equal to union dues to the bargaining representative to retain bargaining unit seniority. In *Brown and Williamson Tobacco Co.*, 227 NLRB 2005 (1977), the Board upheld the legality of a contract clause that permitted a bargaining unit employee who transferred a non-unit position to retain seniority by continuing to pay dues to the bargaining representative. The Board's decision in *Brown and Williamson Tobacco Co.* remained the Board's position until the present case.

There are two reasons why the Court should decide the issue of whether supervisors may be required to pay union dues as a condition of retaining bargaining unit seniority under a labor agreement. First, the issue involves the fundamental structure of the Act. By excluding supervisors from the protection of the Act, Congress made a specific policy determination. The policy decision, that supervisors are not protected by the Act, is a fundamental part of the Act's structure. Second, employers and unions cannot engage in stable collective bargaining where the legality of such contract provisions is not finally resolved. Seniority rights go to the very heart of the labor agreement. Most labor agreements contain seniority provisions which involve trade-offs between not only the employer and the union but among different groups of employees. Many of these agreements provide supervisors with a qualified seniority right to return to the bargaining unit. So that stable collective bargaining can occur on the fundamental issue of seniority rights, the Court should resolve the issue of whether statutory supervisors may be required to pay union dues as a condition of retaining contractual seniority rights.

Both the Board and the court of appeals implicitly assume that supervisors may have accrued or vested seniority rights. This is in conflict with the decisions of the Court. As the Court has long held, there is no such thing as "natural" or "vested" seniority. In *Trailmobile*

Co. v. Whirls, 331 U.S. 40, 53 n.21 (1947), the Court stated:

> "Seniority arises only out of contract or statute. An employee has 'no inherent right to seniority in service'. . . . In private employment, seniority is typically created and delimited by collective bargaining agreement."

Thus, as other courts of appeals have held, the parties are free to eliminate the rights of supervisors to return to the bargaining unit at any time. *Cooper* v. *General Motors Corp.*, 651 F.2d 249, 250-251 (5th Cir. 1981). A union owes no duty of fair representation to a supervisor outside the bargaining unit. *McTighe v. Mechanics Education Society of America Local 19*, 772 F.2d 210, 213 (6th Cir. 1985).

It is therefore clear that, contrary to the Board's decision, a supervisor has no vested seniority rights and his seniority rights are not protected by the Act.

The Court should also grant the writ of certiorari because the Board's decision conflicts with the Court's decision in *Local Lodge No. 1424 Machinists v. N.L.R.B.*, 362 U.S. 411 (1960). Under Section 10(b) of the Act, 29 U.S.C. § 160(b), the Board cannot issue a complaint based upon an unfair labor practice occurring more than six months prior to the filing of the charge with the Board. In *Local Lodge No. 1424*, the Court held that an alleged unfair labor practice which is grounded upon events predating the 10(b) period is time barred. Acts which on their face are lawful cannot be made an unfair labor practice by reliance upon events which, because of Section 10(b), cannot themselves be made the subject of an unfair labor practice complaint.

Here, the Union grieved the placement of the supervisor in a bargaining unit position while bargaining unit employees with seniority were on lay-off. Thus, on its face, the Union's grievance is a complaint that an em-

ployee without seniority was being offered work in violation of the lay-off and recall provisions of the contract, in preference to employees with seniority rights under the contract. The Union's grievance can only be alleged as unlawful if it was unlawful to terminate Ruppelt's bargaining unit seniority rights. Since this occurred in 1972, long outside the Section 10(b) limitations period, the Board could not consistent with the Court's decision in *Local Lodge No. 1424*, use this conduct to make unlawful the filing of the grievance in 1986.

The Board itself holds that the limitations period runs from when an adverse decision is made and communicated to an employee, not when it implemented. *Postal Service Marina Center*, 271 N.L.R.B. 397 (1984). The charging party may not wait until the consequences of the act become painful. *Id.* at 400. When the charging party has notice of facts that create a "suspicion sufficient" to warrant filing a charge, the limitations period begins to run. *Safety-Kleen Corp.*, 279 N.L.R.B. 1117 n.1 (1986).

In 1972, the charging party here became a supervisor and was subsequently denied a withdrawal card from the Union. Knowing the significance of this under the labor agreement, he appealed to a higher union official and was advised that nothing could be done. He then declined to continue paying union dues.

In 1972, the supervisor had specific knowledge that he would lose seniority rights because of his inability to obtain a withdrawal card and his refusal to pay union dues. In his letter to the Union's district director, he refers to the Union's denial of a withdrawal card as an "unfair union practice."

Since, under the Board's own decisions, the limitations period began to run at the end of 1972, his charge filed in June of 1986 is time barred. The Board's decision to the contrary is in conflict with both its own prior deci-

sions and the decision of the Court in *Local Lodge No. 1424 Machinists v. N.L.R.B., supra.*

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MATTHEW R. ROBBINS
Counsel of Record
PREVIANT, GOLDBERG, UELMEN, GRATZ, MILLER & BRUEGGMAN, S.C.
788 North Jefferson Street
Milwaukee, WI 53202
(414) 271-4500
Attorneys for Petitioner

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 89-2623

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MANITOWOC ENGINEERING CO. and CLIPPER CITY LODGE NO. 516, DISTRICT 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Respondents.

Argued May 29, 1990

Decided Aug. 2, 1990

William A. Baudler, Linda J. Dreeben, N.L.R.B., Appellate Court—Enforcement Litigation, Aileen A. Armstrong, Steven B. Goldstein, N.L.R.B., Washington, D.C. Joseph A. Szabo, N.L.R.B., Milwaukee, Wis., and Donald J. Crawford, N.L.R.B., Region 13, Chicago, Ill., for petitioner.

Clifford B. Buelow, Davis & Kuelthau and Matthew R. Robbins, Previant, Goldberg, Uelman, Grantz, Miller & Brueggeman, Milwaukee, Wis., for respondents.

Before BAUER, Chief Judge, and FLAUM, Circuit Judge, and ESCHBACH, Senior Circuit Judge.

ESCHBACH, Senior Circuit Judge.

The National Labor Relations Board (Board) petitions the Court pursuant to section 10(e) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(e), requesting that we enforce its November 30, 1988 order holding Clipper City Lodge No. 516 (Union) primarily liable and Manitowoc Engineering Co. (Company) secondarily liable for violating sections 8(b)(1)(A) and 8(b)(2), and 8(a)(1) and 8(a)(3), respectively, of the NLRA. Whether we do so depends principally on our answer to the following question: Can it reasonably be said that the above mentioned sections of the NLRA were violated by the Union's and Company's maintenance and application of the Union-Company collective bargaining agreement (CBA) Article V, § 17, which requires unit employees promoted to supervisor status to maintain union membership (or obtain a withdrawal card) in order to preserve their right to return to work in the bargaining unit with the seniority that accrued during their tenure as unit employees? The Board concluded that the NLRA was violated by the Union's and Company's maintenance and application of Article V, § 17. *See* 291 NLRB 122. We find the Board's conclusion "to be based upon a reasonably defensible construction of the [NLRA]." *NLRB v. Bufco Corp.*, 899 F.2d 608, 611 (7th Cir.1990). *See also Pattern Makers' League v. NLRB*, 473 U.S. 95, 100, 105 S.Ct. 3064, 3068, 87 L.Ed.2d 68 (1985) (the proper question for a reviewing court is whether the Board's construction of the NLRA is reasonable). Thus, our answer to the question previously posed is, "Yes." We will enforce the Board's order.

I.

Article V, § 17 of the CBA is titled "RETURN TO BARGAINING UNIT—SENIORITY." As the title indicates, it deals with questions of seniority and employment for employees who once worked in the bargaining unit but were transferred or promoted out and who now

seek to return to the bargaining unit due to a retransfer or demotion. For these employees, the general gist of Article V, § 17 is upbeat: "Employees . . . who are transferred or promoted to positions outside the bargaining unit shall retain their accrued seniority." Moreover, these employees have a "right to return to the bargaining unit unless good cause is shown and provided." Article V, § 17, then, seems to provide transferred or promoted employees contentment in knowing that their seniority and right to work in the bargaining unit will not be diminished by their transfer or promotion. Coupled with the CBA's Article V, § 6, which, dealing with "TERMINATION OF SENIORITY," makes no mention of transferred or promoted employees, Article V, § 17 undoubtedly communicates a comforting message.

But Article V, § 17 contains a fly in the ointment. Buried away in the third paragraph of the provision lies a sentence stating that transferred or promoted employees "shall maintain membership in the Union or obtain a withdrawal card in accord with the provision of the Union's Constitution." Thus, the apparent gift of seniority security is made conditional: transferred or promoted employees must earn it. The seniority employees have accumulated throughout their many years of labor in the bargaining unit may, in a wink, disappear, unless when transferred or promoted they either maintain membership or obtain withdrawal. Obtaining withdrawal is easy: the relevant provision of the Union Constitution allows a withdrawal card to issue upon submission of an application, the payment of a minimal fee, and the payment of any overdue financial obligations. But obtaining withdrawal is far from certain; the Constitution states that a withdrawal card "may" issue upon the satisfaction of the above mentioned conditions, not that it "shall" issue. The alternative, maintaining membership, likewise is easy: political fervor is not required, only the satisfaction of "financial core" obligations. *See Pattern Makers' League v. NLRB*, 473 U.S. 95, 106 n. 16, 105

S.Ct. 3064, 3071 n. 16, 87 L.E.2d 68 (1985); *NLRB v. General Motors Corp.*, 373 U.S. 734, 742, 83 S.Ct. 1453, 1459, 10 L.Ed.2d 670 (1963). It is not inexpensive, however; at the very least the payment of dues is required. *See Pattern Makers' League, supra; General Motors Corp., supra.*

In 1972 Eugene Ruppelt faced Article V, § 17 for the first time. Thirty years before, in 1942, Ruppelt had started work at the Company in a unit represented by the Union. In 1972 Ruppelt was promoted to supervisor. This turn of affairs concerned Ruppelt. The promotion was nice, but he was worried about his seniority. Ruppelt had accrued thirty years that all but guaranteed him a job in the bargaining unit; he did not want to accept the promotion, throw those thirty years away, and later find himself demoted and unemployed. Ruppelt sought to alleviate his fears first through the mechanism of Article V, § 17. Upon his promotion, he applied for a withdrawal card. He met the minimal conditions imposed on applicants, yet from the Union no card was forthcoming. Ruppelt's request was blocked by a shop committee chairman, a man miffed by Ruppelt's apparent lack of devotion to the Union and his apparent lack of respect for some of the Union brethren. Ruppelt then sought to alleviate his fears through management. About the quandary created by his lack of a withdrawal card Ruppelt talked to Company officials, who apparently convinced him he had nothing to worry about. Without the withdrawal card, Ruppelt took the promotion. He then quit the Union.

Ruppelt lived the supervisor's life for 14 years without event. In January of 1986, however, the day of reckoning came. Around January 3, 1986, Ruppelt was demoted back to the bargaining unit. For the past 14 years, however, the Company had listed Ruppelt's thirty years accrued seniority on a Union-Company "seniority list," and this without complaint from the Union, so the

Company demoted him with his thirty years accrued seniority. As Ruppelt had anticipated, the seniority came in handy. At the time of his demotion, several unit employees with less seniority were on lay-offs. If Ruppelt's seniority was taken away he too would be unemployed.

When the Union heard of Ruppelt's reemployment in the bargaining unit it immediately raised the hue and cry of unfair labor practice. The Union pointed out to the Company that Ruppelt did not comply with Article V, § 17: he had not obtained a withdrawal card after his promotion, nor had he maintained Union membership (by paying dues). It claimed that Ruppelt forfeited his seniority and, as several employees with seniority were at that time on lay-off, that the Company had no right to employ Ruppelt in the bargaining unit. The Company found itself persuaded by the Union: on January 14 Ruppelt was laid off. Ruppelt, however, was not persuaded. Indignant about the unjustness of his present unemployment position, Ruppelt took his case to the Company's chairman. The chairman imbibed Ruppelt's point of view and shortly thereafter, on April 11, 1986, the Company changed its decision and returned Ruppelt to work in the bargaining unit.

The Union again raised the hue and cry on the issue of Ruppelt. At this point, however, the Company's mood was less disposed towards appeasement. It refused to lay him off. Consequently, the Union filed a grievance. The grievance ultimately came before an arbitrator, who, on June 2, decided that under the "clear and unambiguous language" of Article V, § 17 Ruppelt lost his bargaining unit seniority because he failed to pay dues after his promotion to supervisor. Faced with the arbitrator's decision and the Union's threat to strike over the issue, the Company found itself compelled to lay off Ruppelt. It did so on July 11, 1986.[1]

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[1] Although the Company was compelled to lay off Ruppelt, it championed his cause in the ways open to it. On August 28, 1986,

In the meantime the contumacious Ruppelt lodged an unfair labor practice charge with the Board. Filed June 24, 1986, the charge alleged that the Union's actions had violated the NLRA. On the basis of this charge (and events subsequent to June 24) the Board's General Counsel on December 10 issued a complaint against the Union alleging its violation of NLRA sections 8(b)(1)(A) and 8(b)(2). The Union also lodged an unfair labor practice charge with the Board. Filed December 4, the charge alleged that the Company's actions had violated the NLRA. As a result of this charge the Board's General Counsel on January 8, 1987 issued a complaint against the Company (later amended) alleging its violation of NLRA sections 8(a)(1) and 8(a)(3). The two cases subsequently were consolidated and on stipulated facts the consolidated case proceeded directly to the Board.

II.

The Board concluded that both the Union and the Company violated the NLRA. Its conclusion followed naturally from its finding that Article V, § 17 "is unlawful on its face." In the Board's view, that finding was compelled by the policy of the NLRA to "insulate employees' jobs from their organizational rights," *Local 1384, United Automobile Workers v. NLRB*, 756 F.2d 482, 487 (7th Cir. 1985) (citing *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40, 74 S.Ct. 323, 335, 98 L.Ed. 455 (1954)), and, most directly, by the language of section 8(a)(3), which prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[2] *See* 29 U.S.C. § 158(a)(3).

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the Company filed suit in federal district court seeking to vacate the arbitrator's award. That suit later was held in abeyance pending the outcome of proceedings before the Board.

[2] The Board employed a three part test to determine whether section 8(a)(3) was violated. The test is as follows: The Board

In the Board's interpretation, Article V, § 17 establishes how some employees, those returning to the bargaining unit after a hiatus caused by promotion or transfer, may "acquire" seniority rights and gainful employment in the bargaining unit. The provision allows returning employees to make this acquisition in two ways: (1) by obtaining a withdrawal card, or (2) by paying union dues when not otherwise required to do so. Upon return to the bargaining unit, those employees who made the requisite "acquisition" are more than likely put to work; those who did not are more than likely put to pasture. Consequently, the Board found that with respect to seniority and employment, Article V, § 17 mandates disparate treatment with respect to employment for employees returned to the bargaining unit on the basis of whether or not those employees made the required acquisition. Moreover, the Board found that this disparate treatment encourages union membership in two ways. First, it encourages unit employees subsequently transferred or promoted out of the unit to remain union members (by paying dues) when they have no legal or contractual obligation to do so. Second, it encourages unit employees not yet transferred or promoted out of the unit to be more than "members" satisfying their "financial core" obligation. Because those leaving the unit obtain withdrawal cards only after the Union determines that they are "good" Union members, unit members are encouraged to be not just members, but members with verve.

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determines whether the questioned contract clause causes employees to be treated differently with respect to an employment condition on the basis of union membership. If so, the Board then determines whether the different treatment encourages union activity. If so, the Board finally determines whether the different treatment is justified by the policies of the NLRA. If not, the clause is unlawful, along with the parties' maintenance and application of it. This three part test has received court approval. *See WPIX, Inc. v. NLRB*, 870 F.2d 858, 859, 865 (2d Cir.1989). As neither the Union nor the Company argue against its use, we assume its propriety.

Article V, § 17 looked like a loser in the eyes of the Board: The provision apparently impinged upon the language of section 8(a)(3) by mandating disparate employment treatment of employees on the basis of actions that encouraged union membership. Further, as a mere "means by which the Union is allowed to collect dues from individuals it does not represent in exchange for permitting those individuals to retain seniority they have already earned," the provision was unjustified by any of the NLRA's policies. And lastly, the provision did not fall into the privileged categories set out in the provisos to section 8(a)(3). As a consequence, the Board had no choice but to conclude that Article V, § 17 ran afoul of section 8(a)(3) of the NLRA. It followed from this, and from the facts previously summarized, that the Company violated NLRA sections 8(a)(1) and 8(a)(3) and the Union NLRA sections 8(b)(1)(A) and 8(b)(2).

III.

On appeal, both the Union and the Company argue that the Board erred in finding Article V, § 17 "unlawful on its face." The Company's argument relates not to the Board's interpretation of the NLRA, but to its interpretation of Article V, § 17. The Company maintains that Article V, § 17, *properly interpreted*, gives transferred or promoted unit employees "freedom of choice" in deciding what to do with their return rights because they can either pay dues, or obtain a withdrawal card. Freedom of choice comes into play, so claims the Company, because transferred or promoted employees are entitled to a withdrawal card merely by satisfying two conditions: the payment of a fee and the payment of overdue "financial core" obligations incurred while employed in the bargaining unit. Thus Article V, § 17, properly interpreted, encourages no more from employees than that which legally may be encouraged: the satisfaction of financial core obligations incurred while a unit employee. *See generally*

NLRB v. General Motors Corp., 373 U.S. 734, 83 S.Ct. 1453, 10 L.Ed.2d 670 (1963). In the Company's view the Board erred in interpreting Article V, § 17 as giving the Union discretion to grant or withhold withdrawal cards at its fancy. The Company believes that the Union has no discretion in the matter and that the real unfair labor practice in this case was not the maintenance and application of an illegal Article V, § 17, but the obstinate and illegal behavior on the part of the Union in denying Ruppelt his withdrawal card in 1972 and in fighting his return to the unit in 1986.

In its brief the Company reminds us that "[i]t has long been a rule of labor contract interpretation that ambiguous clauses in collective bargaining agreements should be interpreted in a manner which renders them lawful, if at all possible." It then asserts that the Board erred by not following this rule. The phrase in Article V, § 17 that the Company finds ambiguous reads "shall . . . obtain a withdrawal card in accord with the provision of the Union's Constitution." It is this phrase that the Company would like us to interpret as restricting the Union's discretion in issuing withdrawal cards.[3] As we see it, however, this phrase is not at all ambiguous. In the context of all that Article V, § 17 says, the phrase tells transferred or promoted employees that they may secure their accrued seniority if they obtain a withdrawal card, the process for which is spelled out in the Union Constitution. According to the Union Constitution, an employee should submit an application, pay a minimal fee, and satisfy delinquent financial obligations if he wants a withdrawal card; then the Union may issue the card. *May issue.* We see no ambiguity in this. The word "may," the Union

[3] The Company seems to concede that if obtaining a withdrawal card is more a matter of politics than of meeting (legal) financial obligations, then Article V, § 17 is illegal. Its point simply is that Article V, § 17 does not allow the withdrawal card process to be politicized.

Constitution, and Article V, § 17 are all clear. They mean exactly what the Board found them to mean: that the Union has "substantial discretion" in deciding whether to issue a withdrawal card.

The Company tries to deny this meaning by using sleight of hand in its argument. It first concedes that the Union Constitution's use of "the word 'may' was intended to make issuance of withdrawal cards nonmandatory." But it then argues the opposite, that the Union Constitution makes the issuance of withdrawal cards mandatory when two minimal conditions (the payment of a withdrawal fee and the payment of any outstanding dues) have been met. In so doing the Company takes us from its concession that the word "may" confers discretion on the Union to grant or withhold withdrawal cards to its conclusion that the word "may" removes from the Union all discretion after two minimal conditions have been satisfied. "May" turns into "shall."

We cannot transform "may" into "shall." "May" means what it says. The Union Constitution gives substantial discretion to the Union in granting or withholding a withdrawal card. By requiring a transferred or promoted employee to obtain a withdrawal card "in accord with the provision of the Union's Constitution," Article V, § 17 thereby places the withdrawal card fate of employees at the discretion of the Union. Contrary to the Company's assertion, Article V, § 17 affords the employees no "freedom of choice" between obtaining a withdrawal or maintaining membership. Thus, the Board's interpretation of Article V, § 17 stands.[4]

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[4] The Company also argues that Article V, § 17, as interpreted by the Board, conflicts with the greater principles of Article V, § 6. This conflict cannot remain, argues the Company, thus Article V, § 17 must be interpreted more favorably. We have read both section 6 and section 17. We discern no conflict. Granted, the two provisions do not constitute the apotheosis of harmony. But perfection in communication is rarely achieved when language is the medium, and, in any case, perfection is not required.

The Union cares not how Article V, § 17 is interpreted. Its concern is with the Board's construction of the NLRA. We find no fault with that construction. NLRA section 8(a)(3) prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." *See* 29 U.S.C. § 158(a)(3). And Article V, § 17 seems to engender exactly that which section 8(a)(3) prohibits. Article V, § 17 states, in so many words, that employees returning to the bargaining unit will have their employment treated in disparate ways, and that how one is treated depends entirely on whether or not one stayed in the Union or got a withdrawal card. Article V, § 17 creates a distinction between employees on the basis of the actions they take post-transfer/promotion and pre-return.[5] The effects of this distinction—loss of seniority; loss of job security; loss of the chance to work—are then visited upon those tainted by Article V,

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[5] Article V, § 17 encourages employees to remain members (or obtain a withdrawal card) when they are not statutory employees, but rather, for example, when they are supervisors who are unprotected by the NLRA. *See NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1465 (7th Cir. 1983). But when they remain members or obtain a card is irrelevant to section 8(a)(3). It is the timing of the disparate treatment regarding employment that is important—not the timing of the disparate treatment's cause—and in this case the disparate employment treatment does not occur until the affected individuals are statutory employees, ex-supervisors returned to the fold of the bargaining unit. It is only at that point that some employees work, and others walk.

[6] It is the effect of the distinction and its timing, among other things, that answers the question implied by the Union in its brief, that if an employer and union cannot violate the NLRA by requiring supervisors to be members in a union, how can the Company and Union violate it by requiring supervisors to be members in the Union *if* they want to work when demoted back to the bargaining unit? The short answer is that in the first instance supervisors have their jobs—their supervisory jobs—adversely affected when they violate company policy. In the second instance supervisory jobs are not affected; some supervisors are merely tainted by a dis-

§ 17 after their return to the bargaining unit.[6] Considering this, nothing seems more reasonable than the Board's conclusion that the distinction created by Article V, § 17 results in disparate treatment—discrimination[7]—in regard to protected employment (and protected employees).

Equally reasonable is the Board's conclusion that the disparate treatment occasioned by Article V, § 17 encourages employees to be members of the Union. By its plain words, Article V, § 17 says as much: transferred or promoted employees "shall maintain membership in the Union" at a time when neither law nor contract compels their membership. *See generally Radio Officers' Union v. NLRB*, 347 U.S. 17, 74 S.Ct. 323, 98 L.Ed. 455 (1954). True, the alternative offered by Article V, § 17—obtaining a withdrawal card—is a less direct encouragement, but due to the "political" nature of this process it is an encouragement nonetheless. If one's chances of getting a withdrawal card (and the benefits it brings) increase directly with increases in the degree with which one participates in union activities as a "good Union member," then one naturally is encouraged to be a "good" Union member. Participation in union activities and support and assistance of a union, of course, is "membership" as that term is used in section 8(a)(3). *Radio Officers' Union*, 347 U.S. at 40, 74 S.Ct. at 335; *Local 1384, United Automobile Workers v. NLRB*, 756 F.2d 482, 487 (7th Cir.1985). Article V, § 17's withdrawal option therefore

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tinction that affects them when they later become employees. In the first instance certain individuals experience discrimination only as supervisors. In the second certain individuals experience discrimination not as supervisors, but as employees. The first instance is lawful. The second may not be.

No one contests the fact that the disparate treatment is discrimination, nor could they: "involuntary reduction of seniority, refusal to hire for an available job, and disparate wage treatment are clearly discriminatory." *Radio Officers' Union, infra*, 347 U.S. at 39, 74 S.Ct. at 335.

encourages Union membership, though not as blatantly as its "maintenance" option.[8]

In any case, the command of section 8(a)(3) seems breached; at the very least it is reasonable to think so. Only NLRA policy can save Article V, § 17. Yet we, like the Board, find no policy ready to act the role of savior. The Union makes a few policy arguments. But they fail to persuade; they cannot transform Article V, § 17's statutory breach into something lawful.[9] The only policy

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[8] That disparate treatment caused by a contract clause encourages union membership *in fact* normally is not enough to breach section 8(a)(3). The contract clause causing the disparate treatment must encourage union membership *in intent* as well. *See Radio Officers' Union, supra*, 347 U.S. at 42-44, 74 S.Ct. at 336-37; *United Automobile Workers, supra*, 756 F.2d at 487. "Improper intent need not be separately provided, however, when such encouragement . . . is a natural consequence of the discriminatory action." *United Automobile Workers*, 756 F.2d at 487-88 (citing *Radio Officers' Union*, 347 U.S. at 45, 74 S.Ct. at 338). Apparently the Board found the encouragement wrought by Article V, § 17 to follow naturally from its text, thereby negating the need to discern intent. Neither the Union nor the Company raise the issue, so we do not address it.

[9] The Union argues, in substance, that Article V, § 17 is the result of collective bargaining, which should be encouraged, and as such Article V, § 17 should not be disturbed. We agree that collective bargaining should be encouraged. But we do not agree that this encouragement should go so far as to insulate illegal contract provisions from remedial action. The Union also argues that persons such as Ruppelt are afforded a "substantial benefit" by Article V, § 17's protection of seniority rights, a benefit amounting to unemployment insurance. Ruppelt's required membership in the Union is "merely payment for this undeniably valuable benefit." But if accrued seniority rights are reduced to unemployment insurance, why have seniority at all? Why not sell seniority to the highest bidder? Why not make everybody's accrued seniority, that of unit employees as well as promoted employees, contingent on an extra fee? Why not? Because the actions are illegal: they cause disparate treatment in employment rights and in so doing encourage union membership through the payment of fees. The Union argues

seemingly relevant, that of insulating employees' jobs from their organizational rights and allowing "employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood," *Radio Officers' Union*, 347 U.S. at 40, 74 S.Ct. at 335, bolsters, rather than undermines, the Board's decision.

Thus, ever mindful of our standard of review,[10] we feel compelled by statutory language and labor policy to up-

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further that persons such as Ruppelt benefit by the Union's hard work in negotiating improvements in wages, benefits, and working conditions during their absence from the unit. By requiring such persons to be Union members the Union is merely getting its due. But the set of non-Union persons who might benefit from the Union's work is larger than the set of persons in Ruppelt's situation: it includes all persons who might one day be Union members. Yet only those in Ruppelt's situations are required to pay dues. Most "potential" members buy in to the Union and all its hard work by paying a initiation fee when they first are employed. Ruppelt, and those like him, have already paid their initiation fee, and, in any case, the Union does not seek from them a fee, but rather dues. The Union's hard work might justify the imposition of a reinitiation fee on those in Ruppelt's situation, *see NLRB v. International Union of Operating Eng'rs, Local 139*, 425 F.2d 17 (7th Cir. 1970); *but cf. NLRB v. Office and Professional Employees Int'l Union, Local 2*, 902 F.2d 1164 (4th Cir. 1990), but the benefits from that hard work are not so great or so certain as to justify the imposition of dues. Finally the Union argues that it is only fair for Ruppelt (and those like him) to pay for his seniority. In the event of a lay off that returns him to the bargaining unit he will be entitled to preference over employees who have never been suprvisors, but have always worked in the bargaining unit, and this is unfair. We think the opposite, however, for if Ruppelt has seniority it is clear that he worked in the unit for a longer time, and maintained his Union membership for a longer time, than those whom he replaces.

[10] Under normal circumstances we review a decision and order of the Board narrowly and with a good amount of deference, for we recognize that the Board has Congress's mandate to deal with problems of labor policy. *See Pattern Makers' League v. NLRB*, 473 U.S. 95, 116, 105 S.Ct. 3064, 3076, 87 L.Ed.2d 68 (1985)

hold the Board's conclusion that Article V, § 17 is unlawful on its face. Consequently, its maintenance and ap-

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(White, J., concurring); *United Automobile Workers, supra,* 756 F.2d at 486. Thus, we review the Board's application of rules "for consistency with the Act and for rationality," nothing more; we review the Board's construction of the NLRA for a "reasonably defensible construction," but nothing more. *See NLRB v. Bufco Corp.,* 899 F.2d 608, 611 (7th Cir. 1990); *David R. Webb, Inc. v. NLRB,* 888 F.2d 501, 503, 505 (7th Cir. 1989), *cert. denied,* —— U.S. ——, 110 S.Ct. 2560, 109 L.Ed.2d 743 (1990); *United Automobile Workers,* 756 F.2d at 486. That we might prefer another rule, or another construction, is not dispositive of our decision. *See Ford Motor Co. v. NLRB,* 441 U.S. 488, 497, 99 S.Ct. 1842, 1849, 60 L.Ed.2d 420 (1979). If reasonable, the judgment of the Board must stand no matter what our predilections. *See Pattern Makers' League,* 473 U.S. at 114, 105 S.Ct. at 3075.

The Union argues, however, that our deference should be less and our review more exacting because the circumstances before us are not normal. It points out that the issue resolved by the Board below is hardly novel, having received the Board's attention in the past on at least four occasions. *See Brown & Williamson Tobacco Co.,* 227 NLRB 2005 (1977); *Steel Workers Local No. 1070,* 171 NLRB 945 (1968); *Kaiser Steel,* 125 NLRB 1039 (1959); *Namm's Inc.,* 102 NLRB 466 (1953). It also points out—and here lies the rub—that the Board's opinions are not consistent: the rule laid down by the Board in this case overruled that enunciated in *Brown & Williamson,* which overuled that in *Kaiser Steel,* which overruled that in *Namm's Inc.* The Board, to use the Union's phrase, has "a history of vacillation" on the susubject. But vacillation on a point of law is not something unique to the Board. Even our highest Court occasionally is afflicted by the law's vicissitudes. *Compare Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) *with National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). Nor is vacillation, by itself, cause to abandon deferential review. "An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of *the administrative decision* and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes." *NLRB v. Local Union No. 103, International Ass'n of Bridge Workers,* 434 U.S. 335, 351, 98 S.Ct. 651, 660-61, 54 L.Ed.2d 586 (1978) (emphasis added). *See also NLRB v. J. Weingarten, Inc.,* 420 U.S. 251, 265-67, 95 S.Ct. 959,

plication by the Company and the Union resulted in violations of the NLRA.

IV.

The principal issue having been decided, we take a few paragraphs to dispose of two other issues raised by the Union. The first concerns the statute of limitations. The Union argues that the Board's order is inefficacious because the suit upon which it is based arose outside the six-month statute of limitations imposed by NLRA section 10(b). Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." *See* 29 U.S.C. § 160(b). The Board construes section 10(b) to start the limitations clock from the date a final and unequivocal adverse employment decision is made and communicated to an employee. *See Postal Service Marina Center*, 271 NLRB 397 (1984). We construe section 10(b) in a similar fashion. *See Esmark, Inc. v. NLRB*, 887 F.2d 739, 745-46 (7th Cir.1989). In the

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967-68, 43 L.Ed.2d 171 (1975); *United Automobile Workers*, 756 F.2d at 492; *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1093 (7th Cir. 1984). *But cf. Children's Habilitation Center, Inc. v. NLRB*, 887 F.2d 130, 132 (7th Cir. 1989) ("An administrative agency, like any other first-line tribunal, earns—or forfeits—deferential review by its performance."); *Local 177, Democratic Union Organizing Committee, Seafarers Int'l Union v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978), *reh'g denied*, 602 F.2d 891 (1979).

It is true that our deference has limits. Board orders should not be enforced "where they ha[ve] 'no reasonable basis in law' either because the proper legal standard [is] not applied or because the Board applie[s] the correct standard but fail[s] to give the plain language of the standard its ordinary meaning." *Ford Motor Co.*, 441 U.S. at 497, 99 S.Ct. at 1849. Nor should they be enforced where the Board's interpretation is " 'fundamentally inconsistent with the structure of the [NLRA]' and an attempt to usurp 'major policy decisions properly made by Congress.' " *Id.* But this is not to say that our deference is less than normal in such circumstances; it is merely to say that our deference can go only so far, *i.e.*, only so far as experience and reason will allow.

Union's view, the requisite decision was made and communicated in 1972: it was then that Ruppelt was stripped of seniority. But we cannot agree. The section 10(b) clock started ticking in 1986, not 1972. In 1972 neither the Company nor the Union made a decision with regard to Ruppelt's employment (or the terms and conditions thereof), excepting the Company's decision to give Ruppelt a promotion. Granted, in 1972 the Union made a decision regarding Ruppelt's withdrawal card, but that decision concerned membership, not employment. Granted also, in 1972 Ruppelt himself made a decision to stop paying dues, thereby subjecting himself to problems in 1986. But Rupelt's actions in 1972 cannot constitute the adverse employment decision. The decision must come from the Union or the Company, not from the (dis)affected employee, for it is the decision of the Union and Company that spawned the complaints.[11]

Simply put, the events of 1972 did not amount to "adverse employment decisions." Those decisions did not occur until 1986, when Ruppelt was resigned to reading the "Want" ads. It is from the dates of those decisions that the section 10(b) clock begins to tick. As the Board's order properly limited itself to unfair labor practices occurring within the period of time beginning six months prior to the filing of each unfair labor practice charge, section 10(b) cannot save the Union from the consequences of its decisions.[12]

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[11] Moreover, if the statute of limitations ran from the date an employee did something, benignly or otherwise, that a company later seizes on (or is forced to seize on) to make a decision adversely affecting the employee's employment, unfair labor practice suits might cease to exist. Companies simply would wait six months after the employee's act before rendering their adverse employment decision.

[12] We further note a facet of this case that the Union conveniently failed to address. The General Counsel's prosecution and the Board's decision were based, in part, on the maintenance by the Company and the Union of an illegal contract provision, and the

The second issue we address only briefly. In concocting a remedy for the violations it found the Union and Company to have perpetrated, the Board made the Union and the Company jointly and severally liable "to make Ruppelt whole," but the Union primarily so. The Union finds this troublesome because, in effect, it will have to foot the remedial bill. It asks us to modify the Board's order, arguing that the norm in cases like this is to impose joint and several liability, without more, and that the Board had no reason to deviate from this norm. But this is the wrong argument. If one thing is settled in the area of labor relations it is that "the Board's power [to decise remedies] is a broad discretionary one," *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216, 85 S.Ct. 398, 406, 13 L.Ed.2d 233 (1964), that "the relation of remedy to policy is peculiarly a matter of administrative competence," *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194, 61 S.Ct. 845, 852, 85 L.Ed. 1271 (1941), that an order of the Board will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [NLRA]." *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540, 63 S.Ct. 1214, 1218, 87 L.Ed. 1568 (1943). *See also G. Heileman Brewing Co. v. NLRB*, 879 F.2d 1526, 1534 (7th Cir.1989); 29 U.S.C. § 160(c). The Union has not endeavored to make such a showing, nor could it, for the Board's imposition of primary liability upon it (and the Board's imposition of secondary liability upon the Company) is a decision well grounded in the facts of the case and the policies of the NLRA.

The petition for enforcement is GRANTED.

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application of that provision during January and July of 1986. Where a contract clause "is unlawful on its face, its maintenance and attempted enforcement during the six-month time period will provide the basis for an unfair labor practice charge." *NLRB v. Local 1131, United Automobile Workers*, 777 F.2d 1131, 1140 (6th Cir. 1985). Regardless, then, of what happened in 1972, the existence and application in 1986 of Article V, 17 brings this suit within the time period of section 10(b).

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Before: HONORABLE WILLIAM J. BAUER, Chief Judge

HONORABLE JOEL M. FLAUM, Circuit Judge

HONORABLE JESSE E. ESCHBACH, Senior Circuit Judge

No. 89-2623

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

MANITOWOC ENGINEERING COMPANY and CLIPPER CITY LODGE NO. 516, DISTRICT 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Respondents

Application for Enforcement of an order from the National Labor Relations Board, No. 30-CA-9412

JUDGMENT—WITH ORAL ARGUMENT

Corrected Date: August 2, 1990

This cause was heard on the record from the above mentioned agency, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the National Labor Relations Board in this cause appealed from be, and the same is hereby, ENFORCED, with costs, in accordance with the opinion of this Court filed this date.

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case Nos. 30-CA-9412 and 30-CB-2523

MANITOWOC ENGINEERING CO., Manitowoc, Wis. and MACHINISTS, AFL-CIO, LODGE 516, DISTRICT 10; MACHINISTS, AFL-CIO, LODGE 516, DISTRICT 10 and EUGENE L. RUPPELT, an Individual

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November 30, 1988

291 NLRB No. 122

Before NLRB: Stephens, Chairman; Johansen, Cracraft, and Higgins, Members.

The Union has represented certain of the Employer's employees since about 1942. The collective-bargaining agreement in effect at the time of the alleged unfair labor practices contained in its seniority provisions (art. V) a section (sec. 17) that dealt with the seniority of an employee who has been transferred or promoted outside the unit, his right to return to the unit, and his obligation to maintain union membership. Article V, section 17, of the collective-bargaining agreement, effective November 1, 1984, through October 31, 1987, reads

"SECTION 17, RETURN TO BARGAINING UNIT—SENIORITY

"Employees who were previously covered by the Agreement and who are transferred or promoted to positions outside the bargaining unit shall retain their accrued se-

niority in the department they vacated and shall not accrue seniority after November 1, 1970.

"Employees who are covered by this Agreement and who are transferred or promoted to positions outside the bargaining unit shall retain their seniority to the date of transfer or promotion out of the unit and shall continue to accrue their seniority for an additional six (6) months only.

"An employee covered by the above provisions will be given the right to return to the bargaining unit unless good cause is shown and provided. Further, he shall maintain membership in the Union or obtain a withdrawal card in accord with the provision of the Union's Constitution.

"A supplementary seniority list will be established for persons who have been excluded from the bargaining unit."

The union constitution, referred to in article V, section 17, provides that a withdrawal card may be issued to certain members with the approval of the local lodge in which membership is held.[1]

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[1] Art. I, sec. 18, of the IAM constitution, effective from April 1, 1970, through at least the end of 1972, reads

"Honorary Withdrawal Cards

"Sec. 18. Any member who leaves the trade because of illness, or obtains employment outside the trade or industry, or obtains a supervisory position above the rank of working foreman, or because of circumstances over which the member has no control is compelled, as a condition or employment, to join another labor organization, or enters the Armed Forces of the United States or Canada, and upon complying with the conditions hereinafter set forth, may be issued an honorary withdrawal card by and with the approval of the L.L. in which membership is held.

"Application for withdrawal card, accompanied by a fee of 25 (cents), shall be made to the F.S. or S.T. of the L.L. who, after

Eugene L. Ruppelt was employed in the bargaining unit from 1942 until September 1982 when he left the unit to take the supervisory position of foreman. At the time he was promoted, Ruppelt requested a withdrawal card from the Union. His application for a withdrawal card was considered at a membership meeting of the local lodge on October 26, 1972. The membership voted to deny Ruppelt a card on the recommendation of the shop committee chairman who had previously been involved in an incident with Ruppelt when Ruppelt was a leadman in the unit. Ruppelt appealed the local lodge's action to the directing business representative who replied that he had no authority to interfere with affairs of the local union. Ruppelt did not thereafter maintain union membership by tendering dues.

After Ruppelt became a foreman his name was included on the Employer's periodic seniority rosters that listed individuals who were formerly in the bargaining unit, but were working outside the unit on the date of the listing.

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the application has been approved by the L.L. shall issue same bearing the L.L. seal on a form designed and supplied by the G.L.

"No application will be granted until all fines, dues and special levies charged against the member have been paid in full to date of application.

"Persons discontinuing their membership by accepting withdrawal cards will not be entitled to any benefits or permitted to attend meetings or participate in any of the business of the I.A.M.: however, those persons who enter the Armed Forces of the United States or Canada will receive credit for time spent in such service toward Veteran Badges should they resume membership in the I.A.M. upon their discharge. They shall not violate any of the laws of decisions of the G.L. or L.L. under penalty of having their withdrawal cards cancelled.

"The IAM constitution that became effective January 1, 1985, contains a similar provision."

In late December 1985 the Employer removed Ruppelt from the foreman's job, and on January 3, 1986 [2] transferred him back to the bargaining unit. Within a few days the Union raised the issue of Ruppelt's seniority with the Employer, informing management that Ruppelt had not obtained a withdrawal card, did not have seniority, and could not go to work in the assembly department. The Employer had several discussions with the Union, examined union documents concerning the denial of a withdrawal card to Ruppelt, and concurred with the Union's position. It decided that putting Ruppelt back to work in the unit was an error. On January 14, the Employer discussed the situation with Ruppelt and laid him off. After further management consideration, however, the Employer returned Ruppelt to the unit on April 11.

About April 15 the Union filed a grievance claiming that the Employer had violated article V and other relevant provisions of the collective-bargaining agreement by recalling Ruppelt to a unit position and awarding him full seniority to the detriment of the seniority rights of bargaining unit employees.

The grievance was presented to an arbitrator under an expedited procedure, and an arbitration hearing was held on May 8.[3] The arbitrator issued an award, dated June 2, in which the arbitrator decided as follows: "Eugene Ruppelt did not retain his right to return to the bargaining unit pursuant to the provisions of Article V, Section 17." [4] The Employer then laid off Ruppelt on July

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[2] All dates hereafter refer to 1986 unless otherwise stated.

[3] The transcript of the arbitration hearing, the exhibits, the briefs presented, and the arbitration award are part of the stipulated record in this proceeding.

[4] The arbitrator interpreted the collective-bargaining agreement as follows:

"The language contained in Article V, Section 17, is clear and unambiguous regarding the requirements which must be met by a bargaining unit employee promoted out of the bargaining unit if

11.[5] Ruppelt did not *return* to work for the Employer and retired about April 30, 1987.

Issues

The stipulation sets out three issues for decision: (1) whether deferral to the arbitration award is appropriate; (2) if not, whether the Respondents have violated the Act as alleged in the complaints; and (3) whether the complaints are time-barred under Section 10(b) of the Act.

Contentions of the Parties

With respect to the deferral issue, the General Counsel argues that deferral to the arbitration award is not appropriate because the award is clearly repugnant to the Act and does not comply with the requirements for deferral set forth in *Olin Corp.*, 268 NLRB 573 [115 LRRM 1056] (1984); *Spielberg Mfg. Co.*, 112 NLRB 1080 [36 LRRM 1152] (1955); and *Raytheon Co.*, 140 NLRB 883 [52 LRRM 1129] (1963). On the merits, the General Counsel contends that article V, section 17, is illegal because it gives union members an advantage over financial-core employees, encourages union membership, and discriminates against nonmembers. Concerning the application of Section 10(b), the General Counsel takes the position that the complaint allegations, with the exception of the alleged unlawful layoff of Ruppelt on January 14 in Case 30-CA-9412, are not time-barred, and

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that employee wishes to retain seniority in the bargaining unit. The employee either obtains a withdrawal card or maintains membership in the Union. Ruppelt was denied a withdrawal card in 1972, and he failed to maintain membership in the Union. Under the clear and unambiguous language of the contract he lost his bargaining unit seniority."

[5] On August 28, the Employer initiated a proceeding in the U.S. District Court for the Eastern District of Wisconsin (Civil Action 86-C-0937) to vacate or modify the arbitration award. On January 21, 1987, the court order the case held in abeyance pending the outcome of this proceeding before the Board.

that the Union's argument that the violation involved in the Case 30-CB-2523 occurred in 1972 is without merit.

The Employer asserts that article V, section 17, is not illegal in light of the Board's decision in *Brown & Williamson Tobacco Co.*, 227 NLRB 2005 [94 LRRM 1337] (1977). In the alternative, it argues that the Employer did not participate or acquiesce to the Union's denial of a withdrawal card to Ruppelt and should be only held secondary liable for any backpay the Board may award to Ruppelt. It further requests the Board to leave the provisions of article V, section 17, intact except for conditions the Board may find objectionable. The Employer does not discuss the 10(b) issue and the deferral issue, but points out that it initiated court proceedings to vacate or modify the arbitration award.

The Union contends that the complaints involved are time-barred under Section 10(b) and should be dismissed. In support of its contention, it cites *Postal Service Marina Center*, 271 NLRB 397 [116 LRRM 1417] (1984). The Union also asserts that deferral to the arbitration award is appropriate under *Olin Corp., supra.* With respect to the merits of the 8(b)(2) allegation, the Union argues that it did not force the Employer to do anything, but merely sought compliance with the collective-bargaining agreement.

Discussion and Conclusions

1. The deferral issue: In the following section, we find that article V, section 17, is unlawful on its face. Consequently, under *Olin Corp.*, supra, we deny the Union's request that we defer to the arbitration award because it is not susceptible to an interpretation consistent with the Act.

2. The Merits of the complaint allegations: The issue basic to determining the complaint allegations concerns the lawfulness of article V, section 17, under Section 8(a)(3) and Section 8(b)(2) of the Act. This is not an

entirely new issue for the Board. Previous cases have presented similar contract provisions providing for return of employees with seniority to a bargaining unit after holding nonunit positions dependent on satisfying some financial obligation to the bargaining unit represetative. Board Members have disagreed as to the proper resolution of this troubling and recurring issue. In *Namm's Inc.*, 102 NLRB 466 [31 LRRM 1328] (1953), the Board considered a contract clause that provided for the transfer of certain individuals from outside the unit from the bargaining unit with seniority credit for service in nonunit jobs on payment of a specified fee to the bargaining unit representative. A Board majority found the clause did not violate Section 8(a)(3) or Section 8(b)(2). The majority emphasized that the clause was negotiated in good faith and was motivated by legitimate business considerations, without any desire to discriminate on the basis of union membership or sympathy. The majority saw no discrimination in requiring individuals outside the unit to pay a fee for benefits to which the individuals had no statutory or contractual right, and found no reason to assume that the bargaining representative acted beyond its permissible discretion in adopting a provision that might adversely affect the relative seniority of some unit employees. One Board Member dissented. He viewed the clause as establishing a discriminatory employment condition and favoring nonunit employees willing to pay a price to the union representative. He did not think the the discrimination was excused because it resulted from good-faith negotiations to solve a difficult personnel problem.

Later, in the *Kaiser Steel*[6] and *Columbia Steel*[7] cases, the Board examined contract clauses that provided that

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[6] *Kaiser Steel Corp.*, 125 NLRB 1039 [45 LRRM 1225] (1959).

[7] *Steelworkers Local 1070 (Columbia Steel)*, 171 NLRB 945 [68 LRRM 1215] (1968).

a unit employee who became a superior might return to a unit job with seniority if, while a supervisor, he made payments to the unit bargaining representative equivalent to monthly union dues. In each case, a divided Board found the contract arrangement illegal.

In *Kaiser Steel*, the Board majority, overruling *Namm's*, reasoned that an individual in a supervisory position is under no legal obligation to make payment to a labor organization as a condition of employment. Therefore, he cannot be required to satisfy a membership obligation covering the period of supervisory employment as a condition of reemployment in the unit. One Board Member dissented, relying primarily on the arguments set out by the majority in *Namm's*.

In *Columbia Steel*, the Board majority concluded that the contract provision dealt with seniority rights (a condition of employment) in a discriminatory way that encourages union membership by making the relative seniority status of former supervisors applying to return to the bargaining unit dependent on payment of the equivalent of union dues. Furthermore, the provision conditioned seniority rights of returning employees on payment of dues during a time when they were outside the bargaining unit. Two dissenting Board Members saw the issue posed to be whether a union can require transferred individuals to pay a fee in order to obtain seniority credit to which they would not otherwise be entitled. The dissenters characterized the dues equivalency payment as a reasonable service fee for a valuable option, which provided employment insurance to supervisors, an employer inducement to employees the employer wanted to promote, and a benefit to unit employees whose representation costs would be shared by nonunit individuals.

More recently, in *Brown & Williamson Tobacco Co.*, 227 NLRB 2005 [94 LRRM 1337] (1977), the Board considered the legality of a contract provision that permitted a unit employee who transferred to a nonunit position to

elect to retain and accrue seniority in the unit by continuing to pay dues to the unit representative and, in the event of a layoff, to return to the unit with full seniority. A Board majority, two Members dissenting, overruled *Kaiser Steel* and *Columbia Steel*, and found that enforcement of the provision did not constitute unlawful discrimination within the meaning of Section 8(a)(3). The majority stated it was not inclined to disturb collective-bargaining compromises that secure benefits for all parties, and compared the dues payments required to a service fee. The dissenting Members took the position that the contract provision openly discriminated between employees applying for reentry into the unit on the basis of union membership and was not lawful merely because it benefitted employer and union and was the product of their apparent good-faith bargaining. Under the dissenting position, the contract encouraged individuals to maintain union membership when a union-security provision did not require it, and granted valuable seniority benefits to nonunit employees to the detriment of unit employees.

We have carefully reviewed these earlier Board cases and weighed the opposing arguments they offer as to the legality of provisions of a collective-bargaining agreement such as article V, section 17, in this case.[8] In our judgment, for reasons set out below, article V, section 17 is

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[8] Although the contract clauses in the various cases differ in wording, we see no substantial difference in their meaning. All provide seniority benefits to an employee who returns to the bargaining unit after a period of nonunit employment provided the employee, while outside the unit, assumed some obligation to the unit representative, an obligation variously described as union membership, payment of dues, payment of the equivalent of dues, or payment of a fee. We also see no substantial difference in the contract provisions whether they cover employees promoted to supervisory positions or employees transferred to nonunit positions where they remain statutory employees, because a former supervisor returning to the unit at the end of supervisory employment is an employee within the meaning of Sec. 2(3) of the Act. *Columbia Steel*, 171 NLRB at 948.

contrary to Section 8(a)(3) of the Act, and we overrule *Brown & Williamson Tobacco Co.*

We realize from the earlier cases that the question of how to preserve return rights for employees transferred or promoted from a bargaining unit has been a problem in collective bargaining, and that the contract provision presented to the Board for scrutiny represent an attempt by the parties to resolve this not uncommon problem. Like the Board majority in the *Brown & Williamson* case, we are disinclined to intrude on the collective-bargaining process and upset contract arrangements reached after good-faith bargaining and compromise. We respect the right to parties to the bargaining relationship to determine their own contract terms on the basis of their needs. It is the Board's responsibility, however, on appropriate complaint, to determine whether the contract terms they negotiate are consistent with the requirements of the Act. Where the parties resolve problems in their relationship by adopting contract terms contrary to the Act, the unlawfulness is not privileged by good-faith or practical considerations, and the Board must recognize the unlawfulness and seek to remedy it.[9]

Our analysis of article V, section 17 in the light of Section 8(a)(3) of the Act convinces us that the provision violates the express prohibitions of that section and conflicts with the Act's underlying policy of "insulat[ing] employees' jobs" from union membership considerations.[10]

Section 8(a)(3) prohibits "discrimination in regard to hire or tenure of employment or any term or condition

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[9] *See, e.g., New York Shipping Assn. v. FMC*, 854 F.2d 1338, 1373 [129 LRRM 2001] (D.C. Cir. 1988): "It is not the national labor policy to allow otherwise unlawful activity merely because an employer and a union have agreed to it in mandatory collective bargaining."

[10] *Radio Officers v. NLRB*, 347 U.S. 17, 40 [33 LRRM 2417] (1954).

of employment to encourage or discourage membership in any labor organization. . . ." Provisos to the section permit limited union-security agreements. Application of the section to the specific contract clause at issue requires us to determine, first, whether the clause treats employees differently with respect to an employment condition on the basis of union membership and, second, whether that different treatment encourages union membership.[11] If the answer to both questions is yes, we must then determine whether the different treatment that tends to encourage union activity is justified by the policies of the Act. *Electrical Workers Local 1212 (WPIX, Inc.)*, 288 NLRB No. 49, slip op. at 8 [128 LRRM 1219] (Apr. 1, 1989).

Article V, section 17, deals with a condition of employment—seniority[12]—and establishes how employees returning to the bargaining unit after a period of nonunit employment may acquire seniority rights. It permits a returning employee to acquire those rights provided he has fulfilled an obligation to the Union during his nonunit employment and specifies two ways to satisfy the obligation: by maintaining union membership with the attendant financial liability or by obtaining a withdrawal card in accord with conditions in the Union's constitution. The provision consequently treats employees returning to the unit in a different way with respect to seniority, giving some employees valuable seniority credits and withholding the credits from others. In making the grant or denial of such an advantageous employment condition depend on an employee's fulfilling a union obligation, the provision clearly and inherently encourages individuals to participate in a union activity—the payment of union

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[11] If the inherent tendency of the contract-provision is to encourage union membership, specific intent to encourage need not be proved. Id. at 42-45.

[12] *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 [31 LRRM 2548] (1853).

dues while they are not being represented by the Union—that they otherwise would not be inclined, let alone required, to engage in.[13]

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[13] In this respect, the contract provision here is distinguishable from the one found to be lawful in *Electrical Workers Local 1212*, supra. Under that provision, an employee could leave the unit for up to 2 years in order to work for the union, and continue to accrue seniority for layoff purposes throughout the leave period: leaves of absence for other reasons and accrual of seniority for layoff purposes during such leave were limited to 6 months. The Board found that, although the provision distinguished among employees on leave on the basis of union activities, it did not encourage participation in the activities, but rather removed a condition (inability to accrue seniority) that would have discouraged employees from taking part in those activities. Id. at 8-9. The provision in question in this case, by contrast, removes no impediment to an individual's payment of union dues while he is serving as a foreman; instead, it encourages him to pay dues when otherwise he would have little incentive to do so.

The Union's constitution provides that under certain circumstances a member "may" be issued a withdrawal card, and the facts of this case demonstrate that the Union apparently retains substantial discretion in deciding whether to grant a member's application for such a card. There can be no doubt that the effect of the contractual arrangement is to encourage an individual during his tenure as a unit employee to stay in the Union's good graces lest his application for a withdrawal card be denied, as it was in Ruppelt's case. For, without a withdrawal card, an employee must undertake a financial obligation to the Union if he is to obtain valuable seniority rights.

Employers and unions can, of course, lawfully continue to agree to contract clauses that permit employees who transfer out of the unit to retain and/or accrue seniority. It is obviously beneficial to a collective-bargaining representative in representing the employees in an appropriate unit to know how many individuals may in the future claim unit seniority and how much seniority each can potentially claim. We see nothing improper in the parties to a collective-bargaining agreement including a provision requiring notice to the union when an individual wishes to receive the benefits of such a seniority provision. Thus, the parties can agree to a nondiscriminatory requirement that unit employees in some form register their desire to retain and/or accrue seniority while not working in the unit. Obviously, any contract clause requiring

Having found that the contract provision differentiates among individuals on the basis of fulfillment of a union obligation, and that the differentiation encourages individuals to fulfill that obligation, we must determine whether that disparate treatment is justified by the policies of the Act. We find that it is not. The provision that an individual may retain his accrued seniority while working as foreman by obtaining a withdrawal card or by continuing to pay union dues is in no sense intended to, nor does it, further the effective administration of bargaining agreements, *cf. Dairylea Cooperative, Inc.*, 219 NLRB 656 [89 LRRM 1737] (1976), enfd. sub nom. *NLRB v. Teamsters Local 338*, 531 F.2d 1162 [91 LRRM 2929] (2d Cir. 1976) (superseniority for shop stewards for purposes of layoff and recall). It is simply a means by which the Union is allowed to collect dues from individuals it does not represent in exchange for permitting those individuals to retain seniority they have already earned against the day they may have to seek reemployment in the unit.[14]

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notification to the union cannot permit the union to reject such notification.

Member Cracraft agrees that the contract provision here can be distinguished from the one found lawful in *Electrical Workers Local 1212*, in which she did not participate. Member Cracraft thus finds it unnecessary to pass on the question of whether *Electrical Workers Local 1212* was correctly decided.

[14] We disagree with the majority in *Brown & Williamson* that requiring employees to be union members and assume financial obligations to the union in order to secure unit seniority rights is the equivalent of charging employees a fee for a union's administrative services in handling job referrals from a hiring hall (see *J.J. Hagerty, Inc.*, 153 NLRB 1375 [59 LRRM 1637] (1965), enfd, sub nom. *NLRB v. Operating Engineers Local 138*, 385 F.2d 874 [66 LRRM 2703] (2d Cir. 1967)), or processing welfare and retirement benefits due retirees or terminated employees covered by a unit plan (*see Coal Producers Assn. of Illinois*, 165 NLRB 337 [65 LRRM 1304] (1967)). Here, payments required by art. v., sec. 17, were to be made at a time when the Union was not performing any services for the individuals outside the bargaining unit.

Furthermore, we find that article V, section 17, is not privileged by the provisos to Section 8(a)(3). Indeed, consideration of cases construing the scope of the provisos further supports our view that the contract provision is unlawful. Thus, it is well established that an employee may not be discriminated against because of his failure to pay union dues that had accrued during periods when there was no contractual obligation to maintain membership as a condition of employment. *Painters Local 277 (Webb New Jersey)*, 278 NLRB 169, 171 [121 LRRM 1144] (1986); *Carolina Drywall Co.*, 204 NLRB 1091, 1094-1095 [83 LRRM 1714] (1973). Under article V, section 17, however, Ruppelt was denied reemployment precisely because he failed to pay union dues that had accrued while he was a supervisor and, therefore, under no contractual obligation to maintain membership as a condition of employment. Furthermore, in *Radio Officers*, supra, 347 U.S. at 41-42, the Supreme Court stated that under a union-security clause that complies with the requirements of the provisos to Section 8(a)(3), "an employer can discharge an employee for nonmembership in a union," but "[n]o other discrimination aimed at encouraging employees to join, retain membership, or stay in good standing in a union is condoned." Yet, article V, section 17, purports to sanction just such "other discrimination," namely, denial of seniority and reemployment.

Accordingly, for all the above reasons, we conclude that by maintaining article V, section 17, and applying it to lay off Ruppelt, the Employer violated Section 8(a)(3) and (1); and by maintaining article V, section 17, and causing the Employer to lay off Ruppelt pursuant to the provision, the Union violated Section 8(b)(2) and (1)(A) of the Act.

3. The 10(b) issue: We conclude that the violations we are finding are not time-barred, and we deny the

Union's request that the complaints be dismissed on that ground.

We find that the Employer violated the Act by maintaining and applying article V, section 17, of the collective-bargaining agreement since 6 months before the original charge was filed against the Employer on December 4, 1986, and by laying off Ruppelt on July 11, 1986.[15] We do not find that the Employer violated the Act by laying off Ruppelt on January 14, 1986, as that layoff occurred outside the 10(b) period.[16]

We find that the Union violated the Act by maintaining and applying article V, section 17, of the collective-bargaining agreement since 6 months before the charge was filed against the Union on June 24, and by causing the layoff of Ruppelt on January 14 and July 11, 1986, dates within the 10(b) period.[17] We note the Union's contention that Ruppelt lost his seniority in 1972 when the Union denied him a withdrawal card, and that this conduct is long barred by Section 10(b). The complaint against the Union, however, does not allege the denial of a withdrawal card to Ruppelt as an unfair labor practice, and we find no violation based on the denial of a card to Ruppelt. Thus, the Union's reliance on *Postal Service Marina Center*, 271 NLRB 397 [116 LRRM 1417] (1984), is misplaced because the "unlawful act" in this case is not the denial of a withdrawal card to Ruppelt in 1972, but the Union's causing the Employer

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[15] An amended charge filed January 20, 1987, added an 8(a)(3) allegation without changing the substance of the original charge alleging only an 8(a)(1) violation.

[16] The General Counsel concedes that the January 14 layoff is outside the statutory period, and that the complaint in Case 30-CA-9412 should be amended.

[17] We find it unnecessary to consider whether the Union violated the Act by attempting to cause the Employer to lay off Ruppelt in April, as the General Counsel suggests, because finding that violation would not add to the remedy.

to lay off Ruppelt in 1986 on the basis of article V, section 17, a provision that is itself unlawful.[18] In *Postal Service Marina Center*, the Board declared that in determining when the period for filing a charge under Section 10(b) has expired, it will focus on the date of an alleged unlawful act rather than the date it consequences become effective, provided a final and unequivocal adverse employment decision is made and communicated to the employee.[19] In this case no final adverse decision or action was taken with respect to Ruppelt's employment until after his return to the unit in 1986. From 1972 until he was terminated as a foreman in 1985, Ruppelt's name was carried on the Employer's seniority list showing his seniority as of January 23, 1942.

Conclusions of Law

1. By maintaining and applying article V, section 17, of the collective-bargaining agreement and by laying off Eugene L. Ruppelt on July 11, 1986, the Employer has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

2. By maintaining and applying article V, section 17, of the collective-bargaining agreement and by causing the Employer to lay off Eugene L. Ruppelt on January 14 and July 11, 1986, the Union has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and (2) and Section 2(6) and (7) of the Act.

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[18] *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 805 [16 LRRM 620] (1945) (action based on unlawful rule is, in turn, unlawful).

[19] See also *Stage Employees IATSE Local 659 (Paramount Pictures)*, 276 NLRB 881 [120 LRRM 1135] (1986); *Armco, Inc.*, 279 NLRB 1184 [123 LRRM 1335] (1986.), enfd. in pertinent part 832 F.2d 357 [126 LRRM 2361] (6th Cir. 1987)

Remedy

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[20]

We have found that the Respondents maintained and applied a provision of the collective-bargaining agreement so as to unlawfully discriminate on the basis of union membership, and we shall order them to cease maintaining and applying the provision in this manner.

We have also found that the Employer unlawfully laid off Eugene L. Ruppelt on July 11, 1986, and that the Union unlawfully caused the Employer to lay off Ruppelt on January 14 and July 11, 1986. Therefore, we shall order the Employer to offer Ruppelt immediate and full reinstatement to his former unit job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and we shall order the Union to notify the Employer and Ruppelt, in writing, that it has no objection to Ruppelt's reinstatement. We shall also order the Respondents to restore to Ruppelt the seniority he would have had if they had not applied the collective-bargaining agreement in an unlawfully discriminatory manner, and to make Ruppelt whole for any loss of earnings or other benefits that resulted from the discrimination against him.[21] We shall order the Employer and the Union, jointly and severally, with the Union primarily liable, to make Ruppelt whole for the losses that resulted

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[20] In the circumstances of this case, we find it unnecessary to include a visitatorial clause in the Order as requested by the General Counsel. See *Cherokee Marine Terminal*, 287 NLRB No. 53 (Jan. 28, 1988).

[21] We leave to the compliance stage of this proceeding a determination of the circumstances of Ruppelt's retirement and the effect of his retirement on the backpay order.

from the July 11 layoff [22] by giving him backpay from July 11, 1986, until the date a proper offer of reinstatement is made. The Union's obligation to make Ruppelt whole for the July 11 layoff will cease 5 days after the date it notifies the Employer and Ruppelt that it does not object to Ruppelt's reinstatement. We shall order the Union alone to make Ruppelt whole for any losses that resulted from the January 14 layoff it caused by giving Ruppelt backpay from January 14 to April 11 when he was reemployed with the Employer. Backpay shall be made less any net interim earnings and with interest. It shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950).[23]

ORDER

The National Labor Relations Board orders that

A. The Respondent Employer, Manitowoc Engineering Co., Manitowoc, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and applying article V, section 17, of the collective-bargaining agreement, effective November 1, 1984, through October 31, 1987, with Clipper City Lodge No. 516, District 10, International Association of

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[22] The General Counsel requests that the Board find the Union primarily liable to make Ruppelt whole for the July 11 layoff because the Employer laid Ruppelt off on that date only because of the arbitration award based on the grievance filed by the Union.

[23] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB No. 181 (May 28, 1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

Machinists and Aerospace Workers, AFL-CIO so as to discriminate on the basis of union membership.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Eugene L. Ruppelt immediate and full reinstatement to his former unit job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed, and jointly and severally with Clipper City Lodge No. 516, District 10, International Association of Machinists and Aerospace Workers, AFL-CIO, the labor organization primarily liable, make Ruppelt whole for any losses suffered as a result of his layoff on July 11, 1986, in the manner set forth in the remedy section of this decision.

(b) Restore to Eugene L. Ruppelt the seniority he would have had if the Respondent Employer and the Respondent Union had not applied article V, section 17, of the effective collective-bargaining agreement so as to discriminate on the basis of union membership.

(c) Remove from its files any reference to the unlawful layoff of Eugene L. Ruppelt on July 11, 1986, and notify Ruppelt in writing that this has been done and that the layoff will not be used against him in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in Manitowoc, Wisconsin, copies of the attached notice marked "Appendix A."[24] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent Employer's authorized representative, shall be posted by the Respondent Employer immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent Employer to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent Employer has taken to comply.

B. The Respondent Union, Clipper City Lodge No. 516, District 10, International Association of Machinists and Aerospace Workers, AFL-CIO, Des Plaines, Illinois, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining and applying article V, section 17, of the collective-bargaining agreement effective November 1, 1984, through October 31, 1987, with Manitowoc Engineering Co., so as to discriminate on the basis of union membership.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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[24] If this Order is enforced by a judgment of a United States Court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(a) Immediately notify, in writing, Manitowoc Engineering Co., Manitowoc, Wisconsin, and Eugene L. Ruppelt, at his last known place of residence, that it has no objection to the immediate reinstatement of Ruppelt to his former or a substantially equivalent unit position without prejudice to his seniority or other rights or privileges previously enjoyed.

(b) Make whole Eugene L. Ruppelt for any losses he suffered as a result of his layoff on January 14, 1986, in the manner set forth in the remedy section of this decision, and jointly and severally with Manitowoc Engineering Co., with the Respondent Union primarily liable, make Ruppelt whole for any losses he suffered as a result of his layoff on July 11, 1986, in the manner set forth in the remedy section of this decision.

(c) Request Manitowoc Engineering Co. to accord Eugene L. Ruppelt the seniority he would have had if the Respondent Employer and the Respondent Union had not applied article V, section 17, of the effective collective-bargaining agreement so as to discriminate on the basis of union membership.

(d) Remove from its files, and ask Manitowoc Engineering Co. to remove from its files, any reference to the unlawful layoffs of Eugene L. Ruppelt and notify him in writing that this has been done and that it will not use the layoffs against him in any way.

(e) Post at its office at Des Plaines, Illinois, and all places where notices to employees and members are posted, copies of the attached notice marked "Appendix B."[25] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent Union's authorized representative, shall be posted by the Respondent Union immediately upon receipt and maintained for 60 consecutive days in conspicuous

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[25] See fn. 24, supra.

places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent Union has taken to comply.

Dated, Washington, D.C. November 30, 1988

JAMES M. STEPHENS, Chairman

WILFORD W. JOHANSEN, Member

MARY MILLER CRACRAFT, Member

JOHN E. HIGGINS, JR., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

No. 90-705

JAN 31 1991

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

CLIPPER CITY LODGE NO. 516, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID A. FLEISCHER
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether the Board reasonably found that the union violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A) and (2), by maintaining and enforcing a contract clause denying accrued seniority to an employee because of his failure to pay union dues while he was outside the bargaining unit covered by the contract.

2. Whether the Board reasonably found that Section 10(b) of the Act, 29 U.S.C. 160(b), did not bar a determination that a union committed unfair labor practices by maintaining and enforcing that clause during the six-month limitations period prescribed by that Section.

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OCTOBER TERM, 1990

No. 90-705

CLIPPER CITY LODGE NO. 516, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 909 F.2d 963. The decision and order of the National Labor Relations Board (Pet. App. 20a-41a) are reported at 291 N.L.R.B. No. 122.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a) was entered on August 2, 1990. The petition for a writ of certiorari was filed on October 31, 1990.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. At all times relevant to this case, petitioner, Clipper City Lodge No. 516, District 10, International Association of Machinists and Aerospace Workers, AFL-CIO, represented certain employees of Manitowoc Engineering Company (the Company). Pet. App. 20a. Article V, Section 17, of the collective-bargaining agreement between petitioner and the Company permitted unit employees promoted or transferred to positions outside the bargaining unit to retain seniority accrued while in the bargaining unit, and provided that such employees "will be permitted to return to the bargaining unit unless good cause is shown and provided." *Id.* at 21a. However, the agreement went on to state that any such employee "shall maintain membership in [petitioner] or obtain a withdrawal card in accordance with * * * [petitioner's] Constitution." *Ibid.* The relevant constitutional provision stated that any member of the international union with which petitioner was affiliated who met certain conditions "*may* be issued an honorary withdrawal card by and with the approval of the [local lodge] in which membership is held." *Id.* at 21a n.1 (emphasis added).

Eugene Ruppelt was a bargaining unit employee from 1942 until 1972, when he became a foreman, a supervisory position outside the bargaining unit. He then requested a withdrawal card from petitioner, but petitioner's membership rejected the request on the recommendation of the shop committee chairman, who had previously quarreled with Ruppelt. Thereafter, Ruppelt stopped paying dues to petitioner. However, the Company continued to list his name on

periodic rosters showing the seniority possessed by former bargaining unit employees working outside the unit. Pet. App. 22a.

On January 3, 1986, the Company transferred Ruppelt back to a position within the bargaining unit. Petitioner protested that Ruppelt had no seniority, since he had not obtained a withdrawal card or paid dues, and maintained that he should not be allowed to work, since several unit employees were on layoff status. The Company, accepting petitioner's position, laid off Ruppelt on January 14. Pet. App. 5a, 23a.

After Ruppelt protested his layoff, the Company recalled him on April 11. Petitioner filed a grievance, asserting that the recall of Ruppelt with full seniority violated the collective-bargaining agreement. An arbitrator ruled that, under the "clear and unambiguous language" of Article V, Section 17, Ruppelt had forfeited his bargaining unit seniority by failing to pay dues while he was a supervisor. On July 11, 1986, the Company again laid off Ruppelt. Pet. App. 5a, 23a-24a & n.4.[1]

2. Ruppelt filed an unfair labor practice charge against petitioner on June 24, 1986. Pet. App. 6a. On the basis of this charge, the Board's General Counsel issued a complaint against petitioner. *Ibid.* The Company was the subject of a later charge and complaint, which were consolidated with the case involving petitioner. *Ibid.*

a. Applying the three-step test set forth in *IBEW Local 1212*, 288 N.L.R.B. 374, 376 (1988), aff'd

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[1] The Company filed suit in the United States District Court for the Eastern District of Wisconsin to vacate or modify the arbitration award. The suit has been held in abeyance pending the resolution of the instant unfair labor practice proceeding. Pet. App. 5a-6a n.1, 24a n.5.

sub nom. WPIX, Inc. v. *NLRB*, 870 F.2d 858 (2d Cir. 1989), the Board held that Article V, Section 17, was unlawful on its face.[2] The Board found that the clause treated employees differently with respect to seniority rights on the basis of whether or not they paid union dues and thus inherently encouraged employees to participate in that union activity. Pet. App. 30a-31a. Further—after noting that petitioner had substantial discretion to grant or deny a withdrawal card and that employees had to get a withdrawal card in order to preserve valuable seniority rights without undertaking a financial obligation—the Board also concluded that the contract encouraged employees to remain in petitioner's good graces while still in the bargaining unit. *Id.* at 31a n.13. Finally, the Board found that the clause was not justified by the policies of the Act, since it did not further the effective administration of collective-bargaining agreements, but simply enabled petitioner to collect dues from individuals whom it was not then representing. *Id.* at 32a.

The Board also determined that the provision could not be upheld as a valid union-security provision authorized by the proviso to Section 8(a)(3). The Board explained that the proviso does not authorize discrimination based upon an individual's failure to pay dues at a time when (as was the case with Ruppelt here) the employee has no contractual obligation to make such payments as a condition of employment. Pet. App. 33a. Further, the Board continued,

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[2] That three-step inquiry consists of the following questions: (1) Does the clause treat employees differently with respect to a term or condition of employment on the basis of union membership? (2) Does the difference in treatment encourage union membership? (3) Is the disparate treatment justified by the policies of the Act?

a valid union-security clause may not authorize discrimination other than termination of an employee for nonpayment; here, the contract purported to authorize denial of seniority for nonpayment. *Ibid.*

Accordingly, the Board found that the Company violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), and that petitioner violated Section 8(b)(2) and (1)(A) of the Act, 29 U.S.C. 158(b)(2) and (1)(A), by maintaining Article V, Section 17 of the contract and by applying it to lay off Ruppelt. Pet. App. 33a.[3]

b. The Board rejected petitioner's contention that Section 10(b) of the Act, 29 U.S.C. 160(b), which requires the filing of a charge within six months of an unfair labor practice, foreclosed it from adjudicating those violations. The Board explained that the conduct at issue was not the denial of a withdrawal card, which occurred in 1972, but rather the actions petitioner took, within the six months preceding Ruppelt's charge, to cause Ruppelt to be laid off. Pet. App. 34a-35a. The Board acknowledged that Section 10(b)'s six-month limitations period runs from the date of an allegedly unlawful act, rather than the date its consequences became effective, provided that a final and unequivocal adverse employment decision is made and communicated to the employee. But the Board found that no final adverse decision or action was taken with respect to Ruppelt's employment un-

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[3] In the instant case, the Board (Pet. App. 29a) overruled *Brown & Williamson Tobacco Co.*, 227 N.L.R.B. 2005 (1977), and returned to the position previously taken in *Steelworkers Local 1070*, 171 N.L.R.B. 945, 946 (1968), and *Kaiser Steel Corp.*, 125 N.L.R.B. 1039, 1040-1041 (1959). (*Kaiser Steel Corp.*, in turn, overruled the Board's prior decision in *Namm's, Inc.*, 102 N.L.R.B. 466 (1953). 125 N.L.R.B. at 1041 n.2.)

til after his return to the unit in 1986; although petitioner had denied Ruppelt a withdrawal card in 1972 and he had thereafter ceased to pay union dues, his name had been carried on the Company's seniority lists while he was a foreman. Pet. App. 35a.[4]

3. The court of appeals enforced the Board's order. At the outset, the court rejected the Company's contention that the collective-bargaining agreement left petitioner with no discretion to withhold a withdrawal card from a member who had satisfied his financial obligations to the union. The court explained that, under the contract, the member was required to obtain such a card in accordance with petitioner's constitution, which provided that petitioner "may" issue the card if the member has satisfied those obligations. Pet. App. 8a-10a. Thus, the court concluded, the agreement and the constitution "mean exactly what the Board found them to mean: that [petitioner] has 'substantial discretion' in deciding whether to issue a withdrawal card." *Id.* at 10a.

The court also upheld the Board's determination that the agreement violated Section 8(a)(3) of the Act by unlawfully encouraging union activity. It was reasonable, the court found, for the Board to conclude that the agreement resulted in disparate treatment of employees with respect to employment, since the agreement created a distinction between employees—regarding seniority, job security, and the opportunity to work—based upon the employees' actions between their transfer or promotion and their return to the bargaining unit. Pet. App. 12a-13a.

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[4] The Board found that no timely charge had been filed against the Company with respect to Ruppelt's January 14, 1986, layoff; consequently, it did not find an unfair labor practice against the Company based on that layoff. Pet. App. 34a.

The court also found that the Board acted reasonably in concluding that this disparate treatment encouraged union membership: to assure preservation of their seniority in accordance with the contract, employees were required either to pay union dues after transfer or promotion (when neither the law nor the contract compelled such payment as a condition of employment) or, in order to increase their chances of obtaining a withdrawal card, to provide support and assistance to the union before transfer or promotion. *Id.* at 12a-13a.

The court also upheld the Board's determination that no statutory policy sustained such a contractual provision. Pet. App. 11a-16a. The court explained that "[t]he only policy seemingly relevant, that of insulating employees' jobs from their organizational rights and allowing 'employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood,' [*Radio Officers Union* v. *NLRB*, 347 U.S. 17, 40 (1954)], bolsters, rather than undermines, the Board's decision." Pet. App. 13a-14a.[5]

Finally, the court concluded that Section 10(b) of the Act did not bar an unfair labor practice proceeding. The court noted that the six-month period provided by Section 10(b) begins to run "from the date a final and unequivocal adverse employment decision is made and communicated to an employee." Pet. App. 16a. Here, the court continued, there had been no adverse employment decision in 1972, since the

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[5] The court noted that the Board had reversed its position on the legality of provisions of the type at issue in prior decisions, but ruled that the Board's interpretation was nevertheless entitled to deference. Pet. App. 14a-17a n.10.

denial of a union card related only to union membership, and Ruppelt's decision to cease paying dues was not an action of the employer or the union. The court concluded that the decision to take action adverse to Ruppelt with respect to his employment occurred in 1986 and that the Board's order was properly limited to unfair labor practices within the six-month periods preceding the filing of charges against petitioner and the Company. *Id.* at 16a-17a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

1. a. Section 8(a)(3) of the Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization," except that an employer and a union may agree to a union-security provision meeting specified statutory standards. An employer and a union may agree to make continued employment contingent upon an employee's satisfaction of the union's uniformly imposed financial obligations ("initiation fees" and "periodic dues"). Section 8(b)(2) prohibits a union from causing or attempting to cause an employer to discriminate against an employee in violation of Section 8(a)(3).

While the proviso to Section 8(a)(3) of the Act permits agreements conditioning *continued employment* upon an employee's satisfaction of certain financial requirements, it does not allow an employer and a union to agree to other forms of discrimination

—such as granting or withholding seniority—on the basis of union membership or union activity. See *Radio Officers* v. *NLRB*, 347 U.S. at 39. The Act also prohibits disparate treatment on the basis of whether union members engage in union activities or support the union. As long as employees covered by union-security provisions satisfy their financial obligations to the union, they are free to "be good, bad, or indifferent members" without encountering discrimination in terms or conditions of employment. *Id.* at 40.[6] Finally, a union-security clause may not be given retroactive effect. *NLRB* v. *International Union, Auto Workers, Local 291*, 194 F.2d 698, 701-702 (7th Cir. 1952); *Eclipse Lumber Co.*, 95 N.L.R.B. 464, 467 & n.5 (1951), enforced, 199 F.2d 684, 685 (9th Cir. 1952).

In light of these principles, Section 8(a)(3) may reasonably be construed to prohibit the contract provision at issue. Under that provision, when an individual returns to a bargaining unit after having been promoted or transferred from it, he is entitled to recover previously accrued seniority only if he has paid union dues during the period he was outside the unit or has obtained a withdrawal card. It was reasonable for the Board to conclude that each alternative violates Section 8(a)(3). First, for those individuals denied withdrawal cards, the provision discriminates, in terms of accrued seniority, between individuals who engage in the union activity of paying dues and those who do not. The proviso to Section

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[6] Indeed, they need not be full members of the union, so long as they pay the initiation fees and dues. " 'Membership' as a condition of employment is whittled down to its financial core." *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963).

8(a)(3) does not protect such an agreement, since it protects only those contractual provisions that make continued employment in a bargaining unit contingent upon the payment of union dues during the period of that employment. The contract at issue here, by contrast, conditions the retention of seniority (not employment) on the payment of dues during a period when employment is not contingent upon such payment. Second, under petitioner's constitution, the grant of a withdrawal card is discretionary; thus, the threat that a withdrawal card will be withheld creates an incentive for employees to provide support to the union beyond mere satisfaction of financial obligations.

The Board's determination that the agreement unlawfully discriminated on its face against those in Ruppelt's position embodied a reasonable interpretation of the Act. Consequently, the court of appeals was correct in upholding that determination. *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979). Contrary to petitioner's suggestion (Pet. 6-7), no different standard of review is appropriate because the Board has changed its position on this issue in the past. See note 3, *supra*. "An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statute[]." *NLRB* v. *Iron Workers Local 103*, 434 U.S. 335, 351 (1978). "[A] Board rule is entitled to deference even if it represents a departure from the Board's prior policy." *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990) (upholding Board rule formulated after several changes in position).

See *NLRB* v. *Best Products Co.*, 765 F.2d 903, 910-913 & nn.8-9 (9th Cir. 1985).

b. Petitioner contends (Pet. 7) that Section 8(a)(3) does not prohibit an agreement requiring statutory supervisors—who are excluded from the Act's definition of "employee," 29 U.S.C. 152(3)—to pay dues to preserve their seniority. This contention is not properly before this Court, because it was never raised before the Board, and Section 10(e) of the Act (29 U.S.C. 160(e)) prohibits petitioner from raising it here. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 666 (1982). Section 10(e) provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." The court of appeals rejected petitioner's contention (Pet. App. 11a-12a nn.5-6) without passing on the Section 10(e) issue. However, as *Woelke & Romero* makes clear, the bar of Section 10(e) is jurisdictional.

In any event, petitioner's reliance upon the statutory exclusion of supervisors from the definition of "employee" is misplaced. As the court of appeals recognized (Pet. App. 11a n.5, 12a n.6), petitioner was not held liable on the basis of discrimination against a supervisor as such; the unlawful discrimination occurred when Ruppelt had lost his status as a supervisor and was seeking to return to his status as an employee in the bargaining unit. In that capacity, he was entitled to statutory protection. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 182-187 (1941). Section 8(a)(3) prohibits discrimination in employment based upon union activity predating the employment. As the court of appeals noted, "[i]t is the timing of the disparate treatment regarding employment that

is important—not the timing of the disparate treatment's cause—and in this case the disparate treatment does not occur until the affected individuals are statutory employees, ex-supervisors returned to the fold of the bargaining unit." Pet. App. 11a n.5.[7]

Even if the Act's exclusion for supervisors were construed to protect agreements requiring supervisors to pay union dues to preserve accrued seniority, it would not sustain the contractual provision at issue, for two reasons. First, that provision was not limited to individuals who leave the bargaining unit to become supervisors; it applied equally to those promoted to rank-and-file positions outside the bargaining unit. Since the clause, on its face, did not distinguish between supervisors and non-unit statutory employees, the Board reasonably declined (Pet. App. 28a n.8) to rewrite it to draw such a distinction. Second, the agreement went beyond requiring a supervisor to pay dues at a time when he was employed in that capacity. The Board and the court of

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[7] As petitioner points out (Pet. 6), an employer may discharge a supervisor who joins a union while he is a supervisor. However, it does not follow that an employer may adopt a policy under which it will refuse to hire as employees individuals who were members of a union while they were supervisors. The latter situation involves discrimination against employees.

The statutory provisions denying protection to supervisors were designed to give employers the option of ensuring the undivided loyalty of supervisors by requiring them, on pain of discharge, to refrain from union membership or activity. *Florida Power & Light Co.* v. *IBEW Local 641*, 417 U.S. 790, 808-812 (1974). Enforcement of a contractual provision requiring supervisors to pay union dues to preserve accrued seniority would not advance that purpose. To the contrary, the effect would be to encourage supervisors to engage in union activity while they are supervisors.

appeals both noted (Pet. App. 8a-12a, 31a n.13) that the provision giving petitioner discretion to issue a withdrawal card to an employee leaving the unit, thereby excusing him from paying dues to preserve seniority, encouraged the individual to stay in petitioner's good graces while still an employee in the unit. Thus, even as applied to an individual (such as Ruppelt) who became a supervisor, the agreement tended to encourage union activity at a time the individual was not a supervisor.

c. Contrary to petitioner's contention (Pet. 6, 7-8), the Board's determination did not rest on the proposition that supervisors have a statutory right to retain seniority previously accrued when they worked in the bargaining unit; rather, the Board ruled that, regardless of its source, seniority could not be made contingent on financial or other support for the union. Thus, the Board's decision is in no way inconsistent with *Cooper* v. *General Motors Corp.*, 651 F.2d 249 (5th Cir. 1981). See Pet. 8. In *Cooper*, the court upheld a contract provision that precluded *all* supervisors from accumulating seniority while holding non-unit positions and did not distinguish between supervisors on the basis of union activity or membership. The fact that Ruppelt may not have enjoyed "vested seniority rights" does not mean, as petitioner suggests (Pet. 8), that the Act conferred no protection from a discriminatory withdrawal of seniority.

Nor is there any inconsistency between the decisions below and *Jensen* v. *Farrell Lines, Inc.*, 625 F.2d 379 (2d Cir. 1980), cert. denied, 450 U.S. 916 (1981). See Pet. 6. In *Jensen*, the Second Circuit held that requiring supervisors to pay union dues in order to retain their positions as supervisors did not violate the First Amendment, 625 F.2d at 387-389; the question whether such a requirement would vio-

late the Act was not before the court, *id.* at 381 n.1. In any event, even if supervisors may lawfully be discharged for refusing to pay union dues, it does not follow that, if they fail to pay dues and are retained as supervisors, their failure to pay dues may be made the basis for a denial of seniority when they subsequently become rank-and-file employees. As the court of appeals noted (Pet. App. 11a-12a n.6), discrimination against *supervisors* for their conduct in a supervisory capacity is clearly distinguishable from discrimination against rank-and-file *employees* for their prior conduct as supervisors.

2. There is no merit in petitioner's contention (Pet. 8-10) that Section 10(b) foreclosed the Board's determinations. Section 10(b) provides, in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge and the service of a copy thereof upon the person against whom such charge is made." Ruppelt filed a charge against petitioner on June 24, 1986. Pet. App. 6a. Thus, the Board was free to adjudicate unfair labor practice charges arising from petitioner's conduct on or after December 24, 1985. The Board determined that after that date petitioner committed unfair labor practices (1) by maintaining the unlawful contractual provision and (2) by causing the Company to lay off Ruppelt after that date (see Pet. App. 33a).

There is no conflict between this case and *Local Lodge No. 1424, Machinists* v. *NLRB*, 362 U.S. 411, 416 (1960). In *Local Lodge No. 1424*, the union and the employer entered a contract containing a facially valid union security provision at a time when the union lacked majority support—an action which, if timely challenged, would have been adjudicated an unfair labor practice. More than six months later, a

charge was filed alleging that continued enforcement of the clause violated the Act. This Court held that the charge was time-barred, explaining (*id.* at 419 (emphasis added)):

> *Where * * * a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things*, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations cannot itself be made the subject of an unfair labor practice complaint, we think that permitting resort to the principle that § 10(b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section.

The Court took care to distinguish situations involving "an agreement invalid on its face or * * * one validly executed, but unlawfully administered." *Id.* at 423. That is this case. Both the Board and the court of appeals found the clause unlawful on its face (Pet. App. 17a-18a n.12, 35a); thus, the reasoning of *Local Lodge No. 1424* did not preclude the Board from holding that the maintenance and enforcement of the clause during the limitations period was unlawful.

Petitioner's reliance (Pet. 9) on *Postal Service Marina Center*, 271 N.L.R.B. 397 (1984), is likewise misplaced. The Board held in that case that the statutory limitations period begins to run when an employee receives unequivocal notice of a final decision to take adverse action against him, not when the adverse action is actually taken. 271 N.L.R.B. at 400. However, this holding was limited to "unconditional and unequivocal decisions or actions" and does not

apply to actions conditioned on future events that may never occur. *IATSE Local 659*, 276 N.L.R.B. 881, 882 (1985). In this case, although Ruppelt was denied a withdrawal card and stopped paying dues in 1972, neither petitioner nor the Company took any action with respect to his employment at that time. In fact, as the Board noted (Pet. App. 35a), the Company continued to show Ruppelt's name and accrued seniority on its seniority list until he was terminated as a foreman. Accordingly, he had no unequivocal notice that he would be denied seniority when and if he tried to return to the bargaining unit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID A. FLEISCHER
Attorney
National Labor Relations Board

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